Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NAZARETH ANDONIAN and
VAHE ANDONIAN,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STANLEY I. GREENBERG
Counsel of Record

11845 West Olympic Boulevard, Suite 1000
Los Angeles, California 90064
(310) 444-5999

JERRY L. NEWTON

555 Pier Avenue, Suite 4
Hermosa Beach, California 90254
(310) 372-4636

Attorneys for Petitioners
NAZARETH ANDONIAN and VAHE ANDONIAN

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95 pp

QUESTION PRESENTED

1. Should the trial court have granted the motion to recuse itself from imposing sentence, under 28 USC §455, where:
   a. The trial court compromised its impartiality by improperly injecting itself into plea negotiations with cooperating co-defendants, both threatening and urging them to provide testimony to "convict" these appellants; and
   b. Long before acquiring any knowledge of the case at trial, the preparation of a Presentence Report, or any presentation by the defendants, the trial court repeatedly announced its intention to maximize the sentences it would impose at the end of the case.
2. Whether Congress authorized a sentence of life imprisonment without parole for a violation of 18 USC §1956.

LIST OF PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Nazareth Andonian

Vahe Andonian.

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APPENDIX

A. MEMORANDUM/United States v. Andonian, et al, 9th Cir. C.A. Nos. 91-50622, 91-50623, 91-50624, 91-50625, 91-50626, filed July 19, 1994 A-1/51

B. ORDER (denying rehearing and rejecting suggestions for rehearing en banc), 9th Cir. C.A. Nos. 91-50622, 91-50623, 91-50624, 91-50625, 91-50626, filed Sept. 22, 1994 B-1/2

C. DOCKET SHEET, 8/20/91 entry reflecting denial of motion for recusal C-1

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OPINIONS DELIVERED IN THE CASE

The unpublished opinion of the Ninth Circuit Court of Appeals, dated July 19, 1994, affirming the convictions and sentences, is reprinted in Appendix A. The order of the Ninth Circuit denying the Petition for Rehearing and Suggestion for Rehearing En Banc, dated September 22, 1994, is reprinted in Appendix B. The decision of the District Court denying the motion for recusal is not reported. The trial court's oral ruling is reflected in the docket sheet of August 20, 1991, in Appendix C.

JURISDICTION

1. On December 27, 1990, Petitioners Nazareth Andonian and Vahe Andonian ("Petitioners") were found guilty after a jury trial of conspiracy and twenty (20) counts each of laundering monetary instruments in violation of 18 USC §§371

and 1956. On August 21, 1991, Petitioners were each sentenced to 505 years imprisonment.

2. On July 19, 1994, the U.S. Court of Appeals for the Ninth Circuit, in an unpublished memorandum opinion, entered judgment affirming the convictions and sentencing of Petitioners.

3. On September 22, 1994, the U.S. Court of Appeals for the Ninth Circuit denied Petitioner's Petition for Rehearing and rejected the Suggestion for Rehearing En Banc.

4. This Court has jurisdiction pursuant to 28 USC §1254(1).

STATEMENT OF THE CASE

Petitioners, along with 15 other co-defendants, were indicted for conspiracy to launder monetary instruments and conspiracy to aid and abet distribution of narcotics. Of the 17 defendants in-

dicted, three pled guilty and testified at trial. Nine were either dismissed or acquitted. Five, including Petitioners, were convicted of the money laundering charges alone (not the drug related charges).

The trial spanned nine months from April 1990 to January 1991. Petitioners were sentenced to 505 years apiece by United States District Judge William D. Keller (5 years on the conspiracy count [18 USC §371] and 20 years apiece on each of 20 counts of money laundering [18 USC §1956], each to be served consecutively). Both were first time, non-violent offenders.

Early in the proceedings, three cooperating co-defendants sought to plead guilty pursuant to plea bargains by which they would testify against Petitioners (Vagram "Mario" Tankazyan (hereinafter

referred to as "Mario"), Richard Ferris and Carlos Desoretz). It was during these proceedings that the trial court, by its statements and conduct, took steps to assure the Government would prevail in the forthcoming trial against these Petitioners. It was also during these proceedings that the trial court announced its intention to maximize the sentence he would later impose on these Petitioners once he assured the Government would obtain convictions.

A. Intention to Assure the Government Would Prevail at Trial

The record reflects that the trial court unfairly threw its weight behind the prosecution to both threaten and urge cooperating defendants in order to help "convict" these Petitioners. We submit this record could hardly be clearer.

In evaluating whether to accept the

plea agreement, including his offer to cooperate and testify against the remaining co-defendants, the trial court took sides with the prosecutor. It repeatedly questioned the prosecutor as to the wisdom of offering this plea bargain. The prosecutor urged the trial court to accept the plea agreement because of the expected value of Mario's testimony against Petitioners. However, this did not satisfy the Court. The trial court, trying to assure the Government was advantaged, plainly stated with respect to Mario's proffered cooperation:

> "It has to be the stuff of him helping toward convicting these people [Petitioners]." (RT 21)

This was stated in the presence of, and for the obvious attention of, Mario. Moreover, although the plea agreement plainly constituted a contractual relation between the Government and the de-

fendant, this trial court made itself a contracting party by warning Mario that his cooperation had to satisfy not only the Government but the Court itself:

> "Tell him [Mario] further that if I sense there is a lack of cooperation here, all bets are off. I mean off. You start all over again, and they prosecute him, and they prosecute him in one court, this court.
>
> [DEFENSE COUNSEL]: I understand, your Honor.
>
> THE COURT: He had better understand.
>
> [DEFENSE COUNSEL]: He does.
>
> THE COURT: When they say cooperation, they mean cooperation. And when I say cooperation, I mean cooperation." (Emphasis added.)

Id, supra, at 30. Similar remarks were made during the plea of Richard Ferris, where the Court warned Ferris he was looking at a life sentence if he did not "cooperate":

> THE COURT: And the government is free to say the contract has been breached and --

[PROSECUTOR]: That's right.

THE COURT: -- you are looking at life if you didn't cooperate.

[PROSECUTOR]: Absolutely. Absolutely, your Honor.

THE COURT: And believe me, he is looking at life.

[PROSECUTOR]: But what I would --

THE COURT: You do believe me?

[DEFENSE COUNSEL]: I do believe you, your Honor." (RT 16)

Cooperating defendant DeSoretz was given similar warnings; the Court warned if there was not "total" cooperation, the defendant would have to be back before Judge Keller for sentencing. (RT 15)

B. Stated Threats and Intentions to Maximize Sentence to be Imposed at the End of the Trial.

Aside from compromising its impartiality by requiring the cooperating defendants to help convict the remaining defendants as a condition of accepting their pleas, the trial court also violat-

ed its required impartiality by unabashedly announcing its intention to maximize the sentences it would later impose upon these Petitioners as a deterrent to others. Again, the most striking statement came during the taking of Mario's plea. The trial court could not have been clearer:

> "And I intend to deter forever more anybody doing anything like this." (RT 27)

Similar pre-judging is apparent in the plea of Richard Ferris, where the trial court, in referring to the co-defendants, stated:

> "It [these Petitioners' conduct] is not going to be tolerated." (RT 33)

All of the foregoing statements of intention were made before the trial court heard one word of evidence at trial, much less any post-conviction matters it should properly consider.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Memorandum Opinion of the Ninth Circuit Conflicts With This Court's Opinion in Liteky v. U.S., 114 S.Ct. 1147 (1994).

Just this year, the Supreme Court held in Liteky, supra, that 18 USC §455(a) covers all form of interest and bias. Under that section, claims of bias are to be evaluated on an objective basis. Accordingly, what matters is not the reality of bias or prejudice; but, rather, the appearance thereof. Liteky, supra, at 1153-1154. Additionally, Mr. Justice Kennedy, concurring along with Justices Blackmun, Stevens and Souter made it clear that where a presiding judge states an intent to assure that one side or the other shall prevail, there is little doubt that he or she must recuse. Liteky, supra, at 1159.

What could be more indicative of an

appearance of partiality than a judge who demands that prospective cooperating defendants must provide evidence to "convict" the defendants awaiting trial, or the judge would not accept their guilty pleas. This is as clear a statement as possible of a judge who seeks to assure that one side will prevail -- the Government. When coupled with the urging and threats to the prospective cooperating defendants that their prospective cooperation must satisfy not only the Government, but the trial court also, we submit that is conduct of a judge who is so partial that he must recuse. Liteky, supra. The Ninth Circuit opinion ignored Liteky and obviously framed the issue in a manner to avoid its mandates.

B. The Trial Court Violated the Bright Line Rule Prohibiting Improper Injection by the Court into Plea Negotiations.

Rule 11(e)(1), Federal Rules of Criminal Procedure, provides a clear command against a trial court injecting itself into plea arrangements. The reason, of course, is that a judge should remain aloof before any determination of guilt of the defendants so that its impartiality cannot be questioned at the time of sentencing. The Circuit recently discussed the importance and reasons for this rule in United States v. Bruce, 976 F.2d 552 (9th Cir. 1992). A trial court's improper involvement in the adversary process of plea negotiations is beyond and detracts from judicial duties; the court becomes or seems to become an advocate, resulting in a loss of judicial integrity. Liteky, supra; Bruce, supra; United States v. Anderson, 993 F.2d 1435 (9th Cir. 1993); United States v. Garfield, 987 F.2d 1424 (9th Cir. 1993);

United States v. Werker, 535 F.2d 198, 203 (2nd Cir. 1976). As with Liteky, the Ninth Circuit opinion ignored this entire body of cases and framed the issue in a manner to avoid having to follow their teachings; that is, recusal.

C. The Ninth Circuit Memorandum Opinion Misstated Both the Facts and Law in Holding the Trial Court did not Err in Recusing Itself.

The Ninth Circuit ruled recusal was not required. In so ruling, it held that the trial court merely "wanted to ensure that the defendants who were pleading guilty gave meaningful cooperation to the Government." (Appendix, p. 21) The problem is that this is not the trial court's job. Rather, his duty is to preside impartially and assure a fair trial. Marshall v. Jerrico, 466 U.S. 238 (1980). Nowhere, we submit, is there any authority for the proposition that it is

the duty of the trial court to ensure that defendants who are pleading guilty give "meaningful cooperation" to the Government. Moreover, the Ninth Circuit relied for this proposition on United States v. Monaco, 852 F.2d 1143 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989). Monaco simply allows the trial court to consider knowledge acquired during the course of judicial proceedings in sentencing a defendant. This was not an issue in the case at bench since the trial court here stated its opinions and intentions long before it acquired any knowledge at all. In fact, the challenged statement occurred many months before the Petitioners' trial even began. Thus, this trial court stated its own personal animus and unequivocal intention to maximize the sentence it would impose on Petitioners months before hearing any

evidence concerning the facts of the case. We submit the 505 year sentence is prima facie evidence that the court lost its impartiality long before the trial of this action and should have recused itself.

D. Congress Did Not Authorize a Sentence of Life Imprisonment Without Parole for Violation of Title 18, United States Code, Section 1956.

The Petitioners herein are first-time offenders. Each has spent his adult life working with fine gold bullion, either as a refiner, jewelry manufacturer or gold broker. The evidence at trial reflected the Petitioners engaged for many years in the business of buying and selling gold bullion. The business norm was to pay in cash, given the nature of the commodity being exchanged. Over $300 million in gold bullion was bought and sold by Petitioners in 1988. The allegations at

trial were that these transactions involved the laundering of drug proceeds. The previous year, Petitioners bought and sold over $100 million in gold bullion in cash; and these transactions were not alleged to be illegal. The 1988 transactions were recorded in the books of account of Petitioners Nazareth and Vahe Andonian, and the cash was all deposited into their general bank account. The required currency transaction reports were all duly prepared and filed with the Internal Revenue Service.

At trial, the Petitioners were charged with a conspiracy to aid and abet the distribution of cocaine, which carried a maximum sentence of life imprisonment, 21 USC §846. The jury did not return a verdict of guilty on this charge and it was dismissed on motion of the Government. As the Ninth Circuit opinion ap-

pended hereto notes, ". . . there was no direct evidence of specific narcotics transactions. . .". (Appendix A, p. A-36)

The Petitioners were also charged with a conspiracy to launder drug proceeds in violation of 18 USC §371, and 25 substantive counts of money laundering in violation of 18 USC §1956. The statutory maximum sentence for a violation of the conspiracy count is 5 years imprisonment. The statutory maximum sentence for a violation of the money laundering statute is 20 years.

Each Petitioner was sentenced to 505 years in prison. In sentencing the Petitioners, the trial court was bound to sentence under the Federal Sentencing Guidelines promulgated by the United States Sentencing Commission, 18 USC §991, et seq. In this case, the trial court kept its promise months before

trial to maximize the sentence it would impose on these Petitioners. It ratcheted up the Guidelines and determined that the applicable Guideline range for each Petitioner exceeded the maximum criminal offense level of 43.[1] Under the Guidelines, there is only one sentence which may be imposed when the criminal offense level is 43 (and arguably any offense level above level 43, assuming there are such levels). That sentence is life imprisonment. However, the trial court could not lawfully impose the functional equivalent of a life sentence in this case because Congress has not authorized such an extreme sentence. To the

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[1]The trial court determined that the criminal offense level for Petitioners Raul Vivas and Nazareth Andonian was a level 44, and the criminal offense level for Petitioner Vahe Andonian was a level 45. Each Petitioner was determined to have a criminal history category of I.

extent such a sentence is authorized under the Sentencing Guidelines, we submit they are violative of the Fifth and Eighth Amendments (Due Process and Unusual Punishment).

1. THE SENTENCES IMPOSED ON PETITIONERS ARE IN CONTRAVENTION OF THE STATUTORY FRAMEWORK OF THE GUIDELINES.

The sentences imposed on each of the Petitioners was life imprisonment without the possibility of parole, notwithstanding the fact that it was pronounced in terms of a number of years. Only Methuselah could find comfort in the fact that, with good time credits (18 USC §3624(b), only 429 of the 505 years would have to be served.

Congress did not authorize the Sentencing Commission to impose a sentence of life imprisonment without the possibility of parole for this violation.

28 USC §994 states, in relevant part, as follows:

> "(b)(1) The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of Title 18, United States Code.
>
> (2) If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range for more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment."

A sentence of 505 years is not consistent with the pertinent provisions of Title 18, United States Code. The maximum statutory sentence for a violation of 18 USC §371 is 5 years imprisonment; and the maximum statutory violation for 18 USC §1956 is 20 years. While Petitioners would acknowledge that trial courts have always had the discretion to impose con-

secutive sentences upon conviction for multiple violations, such consecutive sentences were tempered by other provisions of Title 18. Section 1956 became effective on October 27, 1986.[2] At the time this statute went into effect, 18 USC §4205(a) provided that a defendant who received a sentence over 30 years would be eligible for parole consideration after service of 10 years.[3] Thus, at least at the time of its enactment, [mandatory] parole eligibility was extant for violations of §1956. A defendant could not be sentenced to life without parole under the statute Congress passed prohibiting money laundering.

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[2]Money Laundering Control Act of 1986, Pub.L. 99-570.

[3]This provision remained in effect until November 1, 1987. See, Comprehensive Crime Control Act of 1984, Pub.L. 98-473, §235(b)(1)(a) and Sentencing Reform Amendments Act, Pub.L. 99-217.

The 505-year sentences in this case cannot be reconciled with Title 18, nor with the Sentencing Guidelines. The Guidelines authorize sentences ranging from 0-6 months (offense level 1) to life imprisonment (offense level 43). There is no Guideline range setting a sentencing range in number of years, let alone 505 years. 28 USC §994(b)(2) requires that for any sentence involving imprisonment there must be a "range" established where the maximum does not exceed the minimum for said range by more than 25 percent, except where the minimum range is 30 years. A sentence of 505 years simply does not fit into any range of sentences authorized under the Guidelines.

The trial court, as it promised it would before trial, attempted to sentence the Petitioners to life imprisonment

without parole. However, Congress has not authorized such a sentence, and there is no Guideline range for 505 years. Faced with the conflict between the statutory maximum of 20 years and its obvious desire to impose a life sentence, the trial court invented its own Guideline range to get around this anomaly. In doing so, the trial court crafted its own "guidelines" which resulted in a sentence that is inconsistent with both the Sentencing Guidelines and Titles 18 and 28, supra.

2. THE GUIDELINES ARE UNCONSTITUTIONAL TO THE EXTENT THEY PERMIT ANY GREATER SENTENCE TO BE IMPOSED THAN HAS SPECIFICALLY BEEN AUTHORIZED BY CONGRESS.

In Mistretta v. United States, 488 U.S. 361 (1989), this Court concluded that Congress, in creating the Sentencing Commission, "neither delegated excessive legislative power nor upset the constitu-

tional mandated balance of powers among the coordinate Branches." Id., at 412. In so holding, this Court concluded that the delegation of legislative authority to the Commission was sufficiently specific and detailed to meet constitutional requirements:

> ". . . we have no doubt that Congress' delegation of authority to the Sentencing Commission is sufficiently specific and detailed to meet constitutional requirement. Congress charged the Commission with three goals: to 'assure the meeting of the purposes of sentencing as set forth' in the Act; to 'provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records. . . while maintaining sufficient flexibility to permit individualized sentences,' where appropriate; and to 'reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.' 28 USC §991(b)(1)."

Id., at 374.

In Mistretta, the Court focused on the enabling legislation creating the Sen-

tencing Commission. While concluding that the legislation was validly enacted, Justice Blackmun also noted Congress instructed the Commission that these sentencing ranges must be consistent with the pertinent provisions of Title 18 of the United States Code and could not include sentences in excess of the statutory maxima." Id., at 374-75. Thus, the Court in Mistretta, while ruling the legislation valid on its face, did not preclude challenge to the legislation as applied in specific cases.

The Petitioners herein contend that a 505-year sentence for conspiracy and money laundering is not authorized by the legislation creating the Sentencing Commission and, indeed, is inconsistent with the requirement of §994(b)(1) that a sentencing range be established which is consistent with Title 18, United States

Code. Congress could have made the maximum penalty for money laundering life imprisonment, as it has with many other federal violations. It chose not to do so.

The life sentences imposed in this case were ostensibly arrived at by the trial court using the Sentencing Guidelines and finding a sentence of 505 years authorized under same. This result is not consistent with either Title 18, United States Code, or the Sentencing Guidelines. Thus, while the enabling legislation for the Guidelines on its face passes constitutional muster, as applied in this case, the so-called sentencing range calling for a sentence of 505 years is inconsistent with the enabling legislation and Title 18 and is invalid. See, United States v. Larionoff, 431 U.S. 864, 873 (1977). Agencies

delegated authority by Congress must give effect to congressional intent. Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). Where Congress has not authorized life imprisonment without the possibility of parole for violation of a specific federal criminal statute, neither the Sentencing Commission nor a court may take it upon itself to reach that conclusion. And where the Guidelines conflict with statute, the statute controls. United States v. Nottingham, 898 F.2d 390 (3rd Cir. 1990); United States v. Sharp, 883 F.2d 829 (9th Cir. 1989).

3. THE SENTENCES IMPOSED IN THIS CASE VIOLATE THE EIGHTH AMENDMENT'S PROPORTIONALITY REQUIREMENT AND THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE.

The Eighth Amendment contains a proportionality requirement which has been extended beyond the death sentence area

only once. See, Solem v. Helm, 463 U.S. 277 (1983). The Petitioners submit that any Guideline sentence which requires a sentence to be so disproportionate to the offense violates the cruel and unusual prohibitions of the Eighth Amendment. See, United States v. Frank, 864 F.2d 992 (3rd Cir. 1988). Likewise, under the Fifth Amendment, Petitioners are entitled to due process of law in the sentencing proceedings. Petitioner's contend in this petition that the trial court was personally biased against each Petitioner and, in sentencing the Petitioners, violated their due process rights. See, Liteky v. United States, 114 S.Ct. 1147 (1994).

The Petitioners were tried on both drug charges and money laundering violations. They were not convicted of the drug charges but were convicted of the

money laundering charge. The amount of money laundered was found to be in excess of $300 million.[4] The trial court justified its sentence based upon the amount of the money involved in the case. This sentence was pre-ordained, given the comments and stated intention of the trial court months before trial.

The requirements of proportionality and due process are lacking from the proceedings involving the sentencing of these Petitioners. Were they to exist, one could simply point to any money laundering case, determine the amount of money involved, and apply the Guidelines

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[4]Again, this represents the amount of cash deposited into the bank account of Andonian Brothers Manufacturing, Inc., which was used to purchase gold bullion from legitimate gold brokers. The money was used to purchase gold, was accounted for on all books and records of account, and was reported to the Internal Revenue Service. There was no concealment.

to come to a standardized conclusion. Yet, in the only case counsel has found wherein a similarly large amount of money was laundered ($450 million), the defendants therein received sentences under the same guideline scheme of 70 and 78 months. United States v. Arboleda, 20 F.3d 58 (2nd Cir. 1994). This scheme involved $150 million more than Petitioners' and went on for eight years longer. Moreover, the three cooperating defendants (discussed supra), one of whom was described as an "architect" of the scheme, each received sentences of less than 10 years. We submit 505 years is too stiff a price to pay for exercising one's Sixth Amendment right to trial and violates the Fifth and Eighth Amendments.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners Nazareth Andonian and Vahe

Andonian respectfully request that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

STANLEY I. GREENBERG
JERRY L. NEWTON

APPENDIX A

FILED
July 19, 1994
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	Nos.91-50622
	91-50623
Plaintiff-Appellee,	91-50624
	91-50625
v.	91-50626
	D.C. No.
NAZARETH ANDONIAN, VAHE ANDONIAN, RUBEN SAINI, RAUL VIVAS, and JUAN CARLOS SERESI,	CR89-0190-WDK
	MEMORANDUM*
Defendants-Appellants.	

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Argued and Submitted November 1, 1993
Submission deferred December 23, 1993
Resubmitted February 9, 1994
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: BROWNING, BEEZER, and TROTT, Circuit Judges

The defendants appeal their jury convictions and sentences for conspiracy to commit money laundering and for money laundering in violation of 18 U.S.C. §§ 371 and 1956(a)(1)(A)(i) and (B)(i). The government alleged the defendants organized and operated a vast and elaborate money laundering network, known by its participants as "La Mina," which laundered cash drug proceeds by purchasing, trading, and selling gold and then wire-transferring the funds out of the country. Over a three-year period, approximately $316 million were funneled to banks in Central and South America.

Raul Vivas, Juan Carlos Seresi, Ruben Saini, and Vahe and Nazareth Andonian were convicted on Count 2, which alleged conspiracy to launder money. Vivas,

Seresi, and the Andonians were also convicted of individual acts of money laundering alleged in Counts 6-27 and acquitted of money laundering alleged in Counts 3-5. None of the defendants were convicted on Count 1, which alleged conspiracy to aid and abet the possession and distribution of cocaine, in violation of 21 U.S.C. §§ 841, 846 and 18 U.S.C. §2.

Vivas, Seresi, and the Andonians were each sentenced to 505 years in prison. Saini was sentenced to 27 years in prison.

The defendants appeal their convictions and sentences. They assign various errors to pretrial and trial proceedings and to their sentences. We have jurisdiction pursuant to 28 U.S.C. § 1291. We

affirm the convictions.[1] We affirm the sentences of Vivas and the Andonians. We remand for reconsideration and further findings as to the sentences of Seresi and Saini.

I

The money laundering scheme involved in this case is complex. We do not attempt here to summarize the picture which unfolded in eight months of testimony. Because the details are familiar to the parties, we need not here summarize the facts.

II

Defendants Seresi and Saini contend that they were denied their rights under the Speedy Trial Act, 18 U.S.C. § 3161.

---

[1] We have addressed Vivas' argument that his trial on the superseding indictment violated the doctrine of specialty in a separate opinion. Here, we consider the remaining issues related to the trial and sentences.

The Act requires that trial begin within 70 days of the filing of the indictment, unless there is excludable delay under 28 U.S.C. § 3161(h). Seresi and Saini argue that the periods of delay from January 23, 1990 to March 20, 1990, and from March 20, 1990 to April 17, 1990 were not excludable. They also contend that the government did not exercise due diligence in preparing for trial.

We review the district court's factual findings for clear error and its conclusions of law de novo. United States v. Butz, 982 F.2d 1378, 1380 (9th Cir.), cert, denied, 114 S.Ct. 250 (1993). Defendant's contentions have no merit.

The district court found excludable delay based on the "ends of justice" until March 20, 1990. As Vivas had been arraigned only days earlier, the district court found that he was entitled to ade-

quate time to prepare for trial. The district court ordered a further continuance on March 1, 1990, setting trial for April 17, finding the delay excludable both to preserve continuity of counsel for the government and to provide Vivas with additional time to prepare for trial by investigating certain potential witnesses who were in South America.

The district court's findings were not clearly erroneous. Although the prosecutor's estimate of the time needed for another case were overly optimistic, we cannot say the district court clearly erred in determining that the government had acted with due diligence and was entitled to continuity of counsel. See 18 U.S.C. § 3161(h)(8)(B)(iv).

Further, Seresi and Saini cannot complain that the continuances were not excludable to the extent they were grant-

ed to allow Vivas to prepare for trial. A continuance granted to one non-severed defendant applies to all. Butz, 982 F.2d at 1381. Vivas was entitled to a fair opportunity to prepare for trial. United States v. Calabrese, 825 F.2d 1342, 1347 (9th Cir. 1987).

III

Vivas, Seresi, and Saini argue that the district court erred in admitting evidence of other acts under Fed.R.Evid. 404(b). They argue that the district court failed to analyze whether the prior conduct was admitted to prove a material fact, that the government failed to enunciate a specific purpose for admitting the evidence, that the district court failed to weigh the probative value against the prejudicial effect of the evidence, and that the district court failed to properly instruct the jury concerning

the evidence.

The challenged evidence concerns Vivas', Seresi's, and Saini's relationship with Wanis Koyomejian and the Ropex company. It demonstrated that the money laundering methods employed prior to 1987 by Vivas, Seresi, and Saini were similar to the methods employed after the arrangement with the Andonians was established.

Whether the challenged evidence is "other crimes" or prior similar act evidence under Rule 404(b) is a question of law we review de novo. United States v. Hill, 953 F.2d 452, 455 (9th Cir. 1991). We reverse a district court's admission of evidence under Rule 404(b) only for clear abuse of discretion. United States v. Miller, 874 F.2d 1255, 1268 (9th Cir. 1989).

A

Rule 404(b) permits introduction of evidence to prove a person's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." We have consistently held that "the rule is one of inclusion and that other acts evidence is admissible whenever relevant to an issue other than the defendant's criminal propensity." United States v. Mehrmanesh, 689 F.2d 822, 830 (9th Cir. 1982).

Defendants argue that the district court failed to analyze whether the other acts evidence was introduced to prove a material element of the charged offense. See United States v. Arambula-Ruiz, 987 F.2d 599, 602 (9th Cir. 1993). The government may not use evidence of other wrongs unless it establishes that "the evidence is probative of a material issue

in the case, and that sufficient evidence exists for the jury to find that the defendant committed the other acts." United States v. Ramirez-Jimenez, 967 F.2d 1321, 1325 (9th Cir. 1992).

Evidence of prior related activities is admissible under Rule 404(b) "so long as the acts tended to make the existence of [the defendant's] knowledge or intent more probable than it would be without the evidence." United States v. Jones, No. 90-10501, slip op. at 3335 (9th Cir. April 6, 1993).[2] In Jones, we held that evidence that the defendant was involved in an earlier drug importation operation was relevant to establishing his involvement in the charged conspiracy: "In light

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[2] We cite the slip opinion here because West Publishing failed to include the entire opinion in the bound volume in which Jones appears. See Jones, 982 F.2d 380 (9th Cir. 1993).

of the similarity in the modus operandi ... the testimony was relevant as tending to show that appellant had the requisite knowledge and intent to commit the crimes with which he was charged." Id. at 3336.

The same logic applies here. The modus operandi of the alleged money laundering scheme was identical to that of the scheme established by the Rule 404(b) evidence involving Vivas, Seresi, and Saini and the Ropex company. The evidence tends to show both knowledge and intent, which are elements of money laundering. The evidence of Vivas', Seresi's, and Saini's prior relationship also tends to establish the association and plan elements of conspiracy. The district court did not abuse its discretion in admitting the Rule 404(b) evidence to prove material elements of money laundering.

B

The defendants also argue that the government failed to enunciate a specific purpose for admitting the other acts evidence. In demonstrating that Rule 404(b) evidence is relevant, the government must "'articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence.'" United States v. Brooke, 4 F.3d 1480, 1483 (9th Cir. 1993) (quoting Mehrmanesh, 689 F.2d at 830).

The defendants' argument focuses on the government's and the district court's failure to specify on which of the bases under Rule 404(b) the evidence was being offered and admitted. The government relied on all of the possible grounds for admission of the evidence listed in Rule 404(b). We will not reverse on this basis. See Mehrmanesh, 689 F.2d at 830-

C

The defendants also argue that the district court failed to balance properly the probative value against the prejudicial effect of the evidence under Rule 403. We reject this argument.

Once it has been established that the other acts evidence is relevant, "the evidence is admissible only after the Government demonstrates to the trial court that, on balance, its probative value is not substantially outweighed by the danger of unfair prejudice to the defendant." Mehrmanesh, 689 F.2d at 830.

The district court heard extensive argument on the admissibility of the Rule 404(b) evidence, including argument related to its probative value and possible prejudicial effect. Even in the absence of a specific finding that the probative

value outweighed the prejudicial effect of the evidence, "we will uphold admission of the evidence when it is clear from the record that the court implicitly made the necessary finding." Ramirez-Jimenez, 967 F.2d at 1326.

A finding that unfair prejudice was outweighed by the probative value of the evidence was justified in this case. Probative value is measured by the tendency of the evidence to make the existence of Vivas', Seresi's, and Saini's knowledge or intent more probable than it would be without the evidence. Id. at 1327. Unfair prejudice is measured by "the extent to which the testimony 'makes conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury's attitude toward the defendant wholly apart from its judgment as to his

guilt or innocence of the crime charged.'" Id. (quoting United States v. Bailleaux, 685 F.2d 1105, 1111 (9th Cir. 1982)). Evidence related to these defendants' activities involving Ropex prior to their involvement with the Andonians was highly probative of their knowledge, intent, preparation, and plan. There is little about this evidence, however, that would be emotionally provocative to the jury. We agree with the district court that the probative value of the evidence outweighed its prejudicial effect.

D

Third, Vivas, Seresi, and Saini assail the district court's instructions to the jury related to the Rule 404(b) evidence. They contend the instructions were defective because they merely parroted the Rule without identifying the particular basis for which the evidence could be

considered. They also argue that the instructions wee perfunctory and did not guide the jury. Vivas argues that the instructions unfairly focused attention on him and that the district court's use of the word "against" in the instructions was prejudicial.

When Rule 404(b) evidence is admitted, the district court "should ordinarily instruct the jury carefully as to the limited purpose for which the evidence was admitted." United States v. Bradshaw, 690 F.2d 704, 709 (9th Cir. 1982), cert. denied, 463 U.S. 1210 (1983). We hold that the district court did not abuse its discretion in delivering its limiting instructions to the jury. Although the instructions could have been more carefully tailored, we conclude the defendants were not denied a fair trial as a result of the instructions. Cf.

Bradshaw, 690 F.2d at 709. The district court's failure to articulate precisely the bases on which the evidence was admitted caused no prejudice, because the evidence was admissible on most, if not all, of the asserted grounds. Nor did the district court's failure to identify Vivas, Seresi, and Saini individually with each instruction cause prejudice. Because the Rule 404(b) evidence was admitted, on each occasion, for consideration with respect to only these three defendants, it is reasonable to presume that the jury did not need constant repetition of their names, so long as the jury was informed generally that the evidence admitted was for the limited purpose previously identified by the district court.

Vivas' assertion that the jury instructions unduly focused attention on him is

without merit. We reject the argument that the use of the word "against" in the district court's instructions led the jury to believe that all of the Rule 404(b) evidence demonstrated guilt. See United States v. Restrepo, 884 F.2d 1294, 1296-97 (9th Cir. 1989).

IV

The defendants argue that there was a prejudicial variance between the conspiracy charged and the conspiracy proved at trial. A variance occurs when the evidence offered at trial proves facts materially different from those alleged in the indictment. United States v. Van Stoll, 726 F.2d 584, 586 (9th Cir. 1984). "A variance between indictment and proof does not require reversal unless it affects the substantial rights of the parties." United States v. Kaiser, 660 F.2d 724, 730 (9th Cir. 1981), cert.denied,

455 U.S. 956 (1982).

A

Because the asserted variance relates to a conspiracy charge, we must determine whether the single conspiracy charged has been proved. United States v. Bibbero, 749 F.2d 581, 586 (9th Cir. 1984), cert. denied, 471 U.S. 1103 (1985). The question of whether a single conspiracy has been proved is essentially a question of the sufficiency of the evidence. Id. The evidence is sufficient if "'viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Id. at 586-87 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

We apply a "factors" analysis to distinguish multiple from single conspiracies. Bibbero, 749 F.2d at 587.

"The relevant factors include the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transactions; and the commonality of time and goals." Id. A single conspiracy may be identified either by isolating various elements under this factors analysis, or by aggregating the evidence under the general test of whether there was a single overall conspiracy. United States v. Zemek, 634 F.2d 1159, 1167-68 (9th Cir. 1980), cert.denied, 450 U.S. 916, and 450 U.S. 985, and 452 U.S. 905 (1981). The evidence need not exclude every hypothesis but that of a single conspiracy; rather it is enough that it adequately supports a finding that a single conspiracy existed. United States v. Kenny, 645 F.2d 1323, 1335 (9th Cir.), cert. denied, 452 U.S. 920 (1981).

The defendants argue that although the indictment alleged a conspiracy between Vivas, Seresi, Saini, and the Andonians, the evidence at trial proved a larger conspiracy involving the defendants and activities in the Koyomejian indictment. We disagree.

We note first that the evidence related to the Koyomejian case was admitted under Fed.R.Evid. 404(b) as evidence of other crimes or acts committed by defendants Vivas, Seresi, and Saini. Regardless of the inconsistencies in the government's assertions before the district court, the decision to charge the Andonian conspiracy separately from the Koyomejian conspiracy is supported by the record. We do not require that the evidence exclude every hypothesis other than that of a single conspiracy. It is enough that the evidence be sufficient to allow a

rational jury to find the single conspiracy alleged in the indictment.

We have no difficulty concluding that the evidence was sufficient to allow the jury to find that the single conspiracy alleged in the indictment existed. The nature of the scheme, the quality and frequency of transactions, and the commonality of time and goals all tend to show that the defendants were members of a single conspiracy. That Vivas, Seresi, and Saini had been, and continued to be, involved in the strikingly similar conspiracy alleged in the Koyomejian indictment does not alter our analysis of whether the conspiracy alleged here existed.

As to the Andonians, evidence establishing events prior to their joining the conspiracy does not constitute an impermissible variance. See, e.g., Bibbero, 749 F.2d at 588; United States v.

Morse, 785 F.2d 771., 775 (9th Cir.), cert.denied, 476 U.S. 1186, 479 U.S. 861 (1986); United States v. Little, 753 F.2d 1420, 1448-49 (9th Cir. 1984).

B

Even if they established a variance, defendants are entitled to reversal only if their substantial rights are prejudiced. Morse, 785 F.2d at 775. Defendants contend that they were deprived of the right to trial on the charges presented to a grand jury, because the Rule 404(b) evidence dominated the trial. See id.

We reject this claim as nothing more than a restatement of the argument that the Rule 404(b) evidence should not have been admitted. Nor do we agree that the Rule 404(b) evidence dominated the tri-

al.[3] More importantly, the evidence did not materially alter the charge in the indictment. Although the evidence of other crimes and acts contributed to the government's case that Vivas, Seresi, and Saini were members of a conspiracy, it did not rise to the level of altering the conspiracy charged in the indictment.

V

The defendants argue that the district court should have severed the trials. We review for abuse of discretion the district court's denial of a motion to sev-

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[3] Defense counsel estimated that the Rule 404(b) evidence constituted five to ten percent of that adduced at trial. While we need not adopt this assessment, we conclude that it is insufficient to establish that evidence of other crimes so dominated a trial as to result in a prejudicial variance. We similarly reject the assertion that because defendant objected to the admission of Rule 404(b) evidence approximately 86 times over an eight-month period, they have made out a claim of prejudicial variance.

er. United States v. Tootick, 952 F.2d 1078, 1080 (9th Cir. 1991).

Vivas argues that his trial should have been severed from that of all the other defendants; Seresi and Saini argue that their trial should have been severed from that of Vivas and the Andonians; and the Andonians argue that their trial should have been severed from that of Seresi, Saini, and Vivas. All of the defendants base their arguments on two general theories: (1) that the jury could not be relied upon to compartmentalize the evidence against individual defendants; and (2) that the defendants presented mutually antagonistic defenses.

A defendant may be prejudiced by "spillover" of incriminating evidence. United States v. Escalante, 637 F.2d 1197, 1201 (9th Cir.), cert.denied, 449 U.S. 856 (1980). We have identified two

critical compartmentalization issues: (1) whether the district court diligently instructed the jury on the purposes to which various strands of evidence may be put, and (2) whether the jury rendered selective verdicts indicating its ability to compartmentalize. United States v. Cuozzo, 962 F.2d 945, 950 (9th Cir.) (quotations and citations omitted), cert. denied, 113 S.Ct. 475 (1992).

We reject the assertion that the jury failed to compartmentalize. The district court instructed the jury as to the limited admissibility of certain evidence. The jury returned selective verdicts indicating that it found different levels of intent with respect to Vivas and Seresi and acquitting four other defendants.

Severance is also mandated if defendants present mutually antagonistic defenses. Tootick, 952 F.2d at 1081. Mutual

inconsistency is not enough; rather, defendants must show that "acquittal of one codefendant would necessarily call for the conviction of the other." Id. at 1081. We find no merit in defendants' claims that their defenses were mutually antagonistic. The defense of Seresi and Saini claimed a state of mind influenced by Iglesias' assertion that the CIA was connected with the scheme. The Andonians merely pled ignorance of the source of the funds. The jury could believe either of these explanations without being required to convict other defendants as a result. Similarly, Vivas' defense, which was that the money was from legitimate sources did not necessarily conflict with Seresi's and Saini's defense, as they merely argued that, regardless of the source of the funds, they lacked criminal intent. Finally, Vivas' defense was not

compromised by the Andonians defense, because the jury could have believed that the Andonians did not know or wee deceived about the source of the funds without finding that Vivas was involved in criminal activity. Cf. United States v. Ramirez, 710 F.2d 535, 546 (9th Cir. 1983).

Defendants contend that the district court erred in admitting the expert testimony of Special Agent Orton. The decision to admit expert testimony is committed to the discretion of the trial court, and will not be disturbed unless manifestly erroneous. United States v. Kinsey, 843 F.2d 383, 388 (9th Cir.), cert. denied, 487 U.S. 1223 (1988). "Erroneous admission of expert testimony is reversible if the admission more probably than not materially affected the verdict." United States v. Binder, 769 F.2d 595, 601-02 (9th Cir. 1985).

At trial, cooperating government witness Mario Tankazyan testified that a teenage courier delivered a box containing $325,000 to R.A.O.F., one of the currency collection points. When asked if the amount in the box was correct, the courier divided the $325,000 by 25, arrived at $13,000, and responded, "Yeah, its right." Agent Orton testified that between 1987 and 1988, the wholesale price of cocaine ranged from $11,000 to $20,000 per kilogram. The government introduced this evidence to support its theory that the courier was delivering the proceeds of a sale of 25 kilograms of cocaine.

Defendants first argue that the district court failed to exercise its discretion and abdicated its role to the government. This argument is unfounded. The record amply reflects that the dis-

trict court grappled with whether to admit Agent Orton's testimony and decided to do so because the circumstances of the courier's statement suggested a narcotics transaction.

The defendants also argue that the testimony was irrelevant.[4] They note that the courier never mentioned a narcotics transaction or indicated that he was familiar with the price of cocaine. They also state that the record contained evidence that the price of gold ranged from $12,731 to $14,660 per kilogram. They assert that the courier's calculation does not lead to the conclusion that he was more likely referring to the price of cocaine than to the price of gold.

These arguments are not persuasive. Evidence is relevant if it has any ten-

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[4] Vivas asserts that the evidence lacked "foundation."

dencyy to make the existence of a material fact more probable or less probable than if the evidence were excluded. Fed. R. Evid. 401. Agent Orton's testimony was relevant because it tended to show that the courier was calculating the price of a kilogram of cocaine to determine if the amount of money in the box represented the proceeds of a particular sale of 25 kilograms of cocaine. Such testimony is not rendered irrelevant because the courier's statements could also be subject to other interpretations. Indeed, the defendants introduced evidence of the price of gold to support their theory of the case.

The defendants also argue that Agent Orton's testimony was unfairly prejudi-

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Properly characterized, his challenge is to the relevance of the evidence. Defendants do not challenge Agent Orton's qualifications.

cial, because, had it been excluded, the jury would have had a basis to conclude that the financial transactions related to cocaine sales and could only have concluded that they related to gold sales. This argument lacks merit.

> The critical question is whether the probative value of relevant evidence was "substantially outweighed by the danger of unfair prejudice" or was "needless presentation of cumulative evidence." "Unfair prejudice," within the meaning of the rule, occurs when the evidence has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." It is evidence which "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish," or otherwise "may cause a jury to base its decision on something other than the established propositions in the case."

United States v. Skillman, 922 F.2d 1370, 1374 (9th Cir. 1990) (citations omitted), cert. dismissed, 112 S.Ct. 353 (1991). Testimony is not unfairly prejudicial merely because it tends to persuade the

jury that the government's interpretation of the facts is more likely true than not. Agent Orton's testimony resulted in no unfair prejudice to defendants.

The defendants also argue that Agent Orton's opinion testimony was unfairly prejudicial. We have noted that the trial court should not routinely admit opinions of law enforcement officers, which often carry an aura of special reliability and trustworthiness. United States v. Espinosa, 827 F.2d 604, 612 (9th Cir. 1987), cert. denied, 485 U.S. 968 (1988). In Espinosa, we upheld that admission of a law enforcement officer's testimony that a particular exchange was probably an exchange of narcotics for money, that "pay and owe" ledgers contained the names of cocaine buyers, and that the defendant was using a particular apartment as a "stash pad" for money and

narcotics. Id. at 611-613. These types of concerns are not present here. Agent Orton's testimony was limited to issues related to the source, processing, and price of cocaine. He did not offer an opinion on whether the defendants were laundering the proceeds of narcotics trafficking. The district court did not abuse its discretion in admitting the testimony.

VII

Defendants argue that there was insufficient evidence to convict them of money laundering. They note that the government did not introduce any direct evidence of actual narcotics transactions. Rather, it relied solely on circumstantial evidence to prove that the defendants knew that they were laundering money generated by illegal narcotics transactions. In effect, the defendants

ask us to hold that the absence of direct evidence of narcotics trafficking is fatal to a charge of money laundering. We decline the invitation.

We review the sufficiency of the evidence in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Skillman, 922 F.2d at 1372. To prove money laundering, the government must show that

> the defendant conducted a financial transaction which involved proceeds of unlawful activity, that he knew that the property involved was proceeds of some form of unlawful activity, and that he either (1) 'intend[ed] to promote the carrying on of specified unlawful activity' (18 U.S.C. § 1956(a)(1)(A)(i)); or (2) knew that the transaction was designed in whole or in part 'to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.' (18 U.S.C. § 1956(a)(1)(B)(k)).

United States v. Montoya, 945 F.2d 1068, 1076 (9th Cir. 1991).

We have long since abandoned the distinction between direct and circumstantial evidence. E.g., United States v. Poland, 659 F.2d 884, 887 (9th Cir.), cert. denied, 454 U.S. 1059 (1981). Although there was no direct evidence of specific narcotics transactions, there was sufficient circumstantial evidence to tie the proceeds to drug trafficking and to allow the jury to infer knowledge on the part of all of the defendants, including, but not limited to the following:

(1) Cocaine originates in Colombia, where the "owners" of the funds were from;

(2) The funds were transferred to Cambio Italia and banks in Central and South America;

(3) The currency was delivered to the jewelry and gold businesses by young, Spanish-speaking men who used code names and numbers;

(4) The currency arrived in small bills in duffel bags, grocery bags, and boxes;

(5) A witness saw white powder on some of the currency and was told it came from someone having put the money next to drugs;

(6) A courier delivered $325,000 to a currency collection point, divided the amount by 25 to arrive at $13,000, and, at the relevant time, the wholesale price of cocaine ranged from $11,000 t $20,000;

(7) The defendants engaged in counter-surveillance types of activities, including relocating and renaming cash-collection shops, abandoning and hiding money, money counters, and ledgers when

surveillance was detected, and discussing means of avoiding detection; and

(8) The defendants funneled, in 1988 alone, over $300,000 to banks in Central and South America.

The evidence was sufficient to allow the jury to find that the defendants engaged in illegal money laundering.

VIII

Defendants Seresi and Saini claim that the district court erred in giving an Allen charge to the jury. We review for abuse of discretion the trial court's jury instructions. United States v. Cuozzo, 962 f.2d 945, 951 (9th Cir.), cert. denied, 113 S.Ct. 475 (1992). In reviewing an Allen charge, "we consider whether the instruction, taken in its context, had a coercive effect." Id.

Seresi and Saini contend that the Allen charge was coercive, as indicated

by the jury's repeated notes to the court requesting additional instruction and by the length of time the deliberations had continued prior to the Allen charge. See United States v. Foster, 711 F.2d 871, 884 (9th Cir. 1983), cert. denied, 465 U.S. 1103 (1984). Contrary to defendants' assertions, these factors weigh in favor of the charge. The Clerk's record indicates the jury was working actively to reach verdicts, and the four days of deliberations after the Allen charge demonstrate that the jury was not deadlocked. See Cuozzo, 962 F.2d at 952 (noting that several ours of deliberation did not raise a suspicion of coercion). The additional four days of deliberations, given the length and complexity of the evidence, is not unusual. The jury's ability to return verdicts of acquittal as well as guilt, coupled with its ul-

timate inability to reach a verdict on Count 1, indicate an absence of coercive effect.

IX

Defendants argue the district court should have recused himself from sentencing due to his personal bias, arguing that his comments when accepting pleas from other defendants suggested impermissible bias. We review for abuse of discretion the district court's denial of the motion to recuse. United States v. Payne, 944 F.2d 1458, 1476 (9th Cir. 1991), cert. denied, 112 S.Ct. 1598 (1992). To evaluate possible bias, we employ an objective test of "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." Payne, 944 F.2d at 1476.

The comments during his acceptance of

guilty pleas, taken as a whole, indicate that the district judge had strong feelings about the crimes alleged, wanted to deter these types of crime from occurring in the future, and wanted to ensure that the defendants who were pleading guilty gave meaningful cooperation to the government. We do not agree that these statements demonstrate bias toward the defendants taking their case to trial. Knowledge obtained by the district judge during these pretrial proceedings does not require reversal. United States v. Monaco, 852 F.2d 1143, 1147 (9th Cir. 1988), cert. denied, 488 U.S. 1040 (1989).

X

Seresi, Saini, and the Andonians challenge their sentences under the United States Sentencing Guidelines. We review for clear error the factual findings

underlying the sentence. United States v. Burns, 894 F.2d 334, 336 (9th Cir. 1990). We review de novo the district court's interpretation of the guidelines. United States v. Hayes, 7 F.3d 144, 145 (9th Cir. 1993), cert. denied, 114 S.Ct. 1403 (1994).

Defendants challenge the district court's determination of the base offense level, the court's adjustments to the base offense levels, and the court's upward departure. They also argue that their sentences violate due process and equal protection principles.

A

Defendants argue that their base offense levels should have been based on U.S.S.G. § 2S1.2, rather than on § 2S1.1. This argument has no merit. Section 2S1.1 applies if a defendant is convicted of money laundering pursuant to 18 U.S.C.

§ 1956, as these defendants were. The argument that the evidence did not prove the source of the funds was drug trafficking goes to the issue of the sufficiency of the evidence for purposes of conviction. The evidence was sufficient both for conviction and for determination of the base offense level.

B

The Andonians, Seresi, and Saini argue that they should not have received an adjustment to their base offense levels on the ground that over $300 million were laundered, because they were not each personally responsible for laundering this entire sum.

Section 2S1.1(b)(2)(N) provides for an adjustment of thirteen levels if the amount of money laundered was over $100 million. The government established that the total amount of funds laundered dur-

ing the period of time alleged in the indictment exceeded $300 million. The government argues that under U.S.S.G. §1B1.3(a)(1) and general principles of coconspirator liability, each defendant is liable for all of the funds involved. See United States v. Changa, 901 F.2d 741, 744 (9th Cir. 1990).

We have held, however, that §1B1.3

> is explicit in making a distinction among members of a conspiracy in terms of "the scope" of the activity. This approach distinguishes the Guidelines from the general harsh law of conspiracy that a conspirator is bound by all that has gone on before in the conspiracy. Under the Guidelines, each conspirator, for sentencing purposes, is to be judged not on the distribution made by the entire conspiracy but on the basis of the quantity of drugs which he reasonably foresaw or which fell within "the scope" of his particular agreement with the conspirators.

United States v. Petty, 992 F.2d 887, 890 (9th Cir.) (citations and quotations omitted), cert. denied, 114 S.Ct. 1015

(1993). Petty requires that the district court determine both the quantity of drugs distributed that were reasonably foreseeable by each defendant and the quantity of drugs distributed that were within the scope of the particular agreement that each defendant entered. Id. at 891.

We are aware of no specific findings by the district court as to the scope of each defendant's agreement or as to the reasonable foreseeability to each defendant of the amount of money laundered. As to the Andonians, the record demonstrates that the entire $316 million was funneled through their gold exchange business. However, we cannot say that, with respect to defendants Seresi and Saini, who were not personally involved in handling all of the funds, the lack of specific findings is harmless. We there-

fore remand to the district court for appropriate findings and, if necessary, resentencing consistent with those findings.

C

Defendants also argue that they should not have received adjustments for their roles as organizers (Nazareth Andonian) or managers (Vahe Andonian and Seresi). U.S.S.G. §§ 3B1.1(a) and (b) provide for a four-level adjustment based on the defendant's role as an organizer or leader and a three-level adjustment for the defendant's role as a manager or supervisor. We review for clear error district court's findings that these defendants were organizers or managers. United States v. Sanchez, 908 F.2d 1443, 1449 (9th Cir. 1990).

The record reflects that Nazareth Andonian made significant decisions with

respect to the trading of gold. The Andonians' business played a central role in processing the currency to buy gold, and they exercised authority over employees of several businesses. Seresi was an agent of Vivas, making decisions about how to continue the money-laundering operation in the face of numerous obstacles. It is irrelevant for purposes of the adjustment that many of those supervised by the defendants were acquitted. U.S.S.G. § 3B1.1, comment. (n.1).

D

Defendants Vahe Andonian, Seresi, and Saini argue that their sentences should not have been adjusted for obstruction of justice. Section 3C1.1 provides for a two-level adjustment for the willful obstruction or attempted obstruction of justice. The district court found that Vahe Andonian perjured himself at trial.

Andonian testified that he went to New York in May of 1988 for business reasons unrelated to recovering funds which had been abandoned by a coconspirator. This testimony was contradicted both by Andonian's asserted business contact, and by other witnesses who testified that Andonian went to New York to retrieve the funds. The district court did not clearly err in determining that Andonian committed perjury.

The district court found that Seresi instructed Saini to destroy evidence and that both defendants committed perjury. The destruction of records alone supports the district court's finding. U.S.S.G. § 3C1.1(3)(1). The district court did not clearly err in determining that Seresi and Saini perjured themselves at trial.

E

Defendants argue that the district court erred in departing upward from the guideline range. We review district court's decision to depart from the guidelines under a three-part test established in United States v. Lira-Barraza, 941 F.2d 745, 746-47 (9th Cir. 1991) (en banc); United States v. Cruz-Ventura, 979 F.2d 146, 148 (9th Cir. 1992).

The district court departed upward because U.S.S.G. § 2S1.1(b)(2), which provides for an increase of thirteen levels where the amount of money laundered exceeds $100 million, does not provide for a greater increase for substantially larger sums. If the Commission had intended a scale that went beyond $100 million, it would have created a formula by which the sentencing court could cal-

culate the number of levels to increase the base offense level. Instead, the Commission created a scale ending in "[m]ore than $100,000,000." U.S.S.G. § 2S1.1(b)(2)(N). The district court's statement that "[t]hese defendants engaged in conduct which clearly was not contemplated by the drafters" is unfounded.

Nevertheless, the district court's one-level adjustment was justified on another basis. The district court also based the one-level adjustment on the sophistication and scope of the money laundering organization. The district court did not err in its finding that this money laundering operation was vast and sophisticated. This finding supports the one-level adjustment. See United States v. Shields, 939 F.2d 780, 783 (9th Cir. 1991).

F

Defendants challenge their sentences on constitutional grounds. Although the sentences are extreme, they do not violate the Constitution. See, e.g., Harmelin v. Michigan, 501 U.S. 957 (1990) (mandatory life sentence for drug crime not unconstitutional); United States v. Litteral, 910 F.2d 547, 551-553 (9th Cir. 1990) (rejecting challenges to guidelines sentence based on equal protection and due process).

X

The convictions of the defendants are affirmed. The sentences of Vivas, Vahe and Nazareth Andonian are affirmed. We remand to the district court for further findings and for resentencing, if necessary, of Seresi and Saini.

AFFIRMED IN PART AND REMANDED.

APPENDIX B

FILED
September 22, 1994
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	Nos.91-50622
	)	91-50623
Plaintiff-Appellee,	)	91-50624
	)	91-50625
v.	)	91-50626
	)	D.C. No.
NAZARETH ANDONIAN, et al.)		CR89-0190-WDK
	)	
Defendants-Appellants.	)	ORDER
_____	)	

Before: BROWNING, BEEZER, and TROTT, Circuit Judges

The panel has voted to deny appellants' petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge in active service has requested a vote to rehear the matters en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the peti-

tions for rehearing are denied and the suggestions for rehearing en banc are rejected.

APPENDIX C

PROCEEDINGS

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08/20/91 943 Status hearing held (SENTG - DFTS MOTN TO DISQUALIFY TRIAL COURT FRM MPOSING SENT, DFTS MOTN FOR NEW TRIAL. DFTS MOTN TO DISQUALIFY TRIAL COURT FRM IMPOSING SENT IS DENIED. DFT'S MOTN FOR NEW TRIAL IS DENIED. CRT HEARS ARGUMENT BY COUNSEL RE UPWARD DEPARTURE. DFTS ARE GIVEN RIGHT TO ALLOCUTION. DFTS SAINI AND SERESI ADDRESS COURT REMNG DFTS WAIVE RIGHT TO ALLOCUTION. IMPOSITION OF SENT IS CONT'D TO 8-21-91 AT 1:00 P.M...LJ (L.DALEY)) (JUDGE KELLER) (Dkt'd 08/28/91.

943 Motion for new trial denied (MOT#119) (JUDGE KELLER) (Dkt'd 08/28/91).

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